

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

August 25, 2020

Lyle W. Cayce  
Clerk

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No. 19-10047

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EUGENE WILLIAMS,

*Plaintiff—Appellant,*

*versus*

JENNY K. SCHEEF, LVN; EDWARD PHARR, WARDEN; BRYAN  
COLLIER, EXECUTIVE DIRECTOR OF TDCJ; TEXAS TECH  
MEDICAL BRANCH,

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 5:18-CV-138

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Before SMITH, WILLETT, and DUNCAN, *Circuit Judges.*

PER CURIAM:\*

Eugene Williams brought 42 U.S.C. § 1983 claims, *in forma pauperis*, against nurse Jenny K. Scheef and others. The magistrate judge dismissed

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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the claims as frivolous.<sup>1</sup> While we disagree that the claim is frivolous, Williams does fail to state a claim, so we affirm the dismissal.

## I

Under § 1915(e)(2)(B) of the Prison Litigation Reform Act, a “court shall dismiss” a case taken *in forma pauperis* “at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(i)-(ii) (emphasis added). Regardless of whether the case is dismissed as frivolous or for failure to state a claim, the PLRA’s three-strikes rule—which limits a prisoner’s ability to file suit IFP—is implicated.<sup>2</sup> *Id.* § 1915(g). So, for our purposes, the only difference between a case dismissed under subsection (i) and a case dismissed under subsection (ii) is our standard of review. A dismissal for frivolity we review for abuse of discretion, and a dismissal for failure to state a claim we review de novo. *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998).

## II

In this case, the magistrate judge’s analysis sounded more in failure to state a claim, discussing Williams’s failure to plead sufficient facts, but the judgment’s decretal language ordered that Williams’s claims “be DISMISSED with prejudice as frivolous.” So we first consider whether the

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<sup>1</sup> Williams consented to proceed before the magistrate judge, as permitted under 28 U.S.C. § 636(c).

<sup>2</sup> Specifically, the three-strikes rule “generally prevents a prisoner from bringing suit [IFP]—that is, without first paying the filing fee—if he has had three or more prior suits ‘dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted.’” *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020).

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district court abused its discretion in dismissing Williams’s claim as *frivolous*, and then address whether his allegations are *sufficient*.

A

A complaint “is frivolous where it lacks an arguable basis either in law or fact,” meaning it either embraces an “inarguable legal position” or relies on a “fanciful factual allegation.” *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). However, “a complaint filed *in forma pauperis* is not automatically frivolous . . . because it fails to state a claim.” *Id.* at 331.

Here, Williams claims that Scheef was deliberately indifferent to his serious medical needs when she adjusted his catheter, which was leaking, even though a doctor instructed that, as long as “urine is still going into the catheter bag,” it should not be “mess[ed] with,” “because it will cause more harm than good.”<sup>3</sup> He claims that, as a result of Scheef’s actions, his bladder was damaged, causing significant pain and requiring “major corrective surgery.”

Though Williams’s claim may not ultimately prevail, it is not grounded in an “inarguable legal position,” nor is it based on a “fanciful factual allegation.” *Id.* A prison official *can be* deliberately indifferent to a prisoner’s serious medical needs if the official “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Domino v. Tex. Dep’t of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). And here, Williams has alleged that Scheef knew she should not adjust his catheter, “because it will cause more harm than good,” yet she

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<sup>3</sup> On appeal, Williams briefs only his argument against Scheef for her alleged deliberate indifference. Because he does not brief the other issues raised in his Amended Complaint, we consider them abandoned. *See Ruiz*, 160 F.3d at 275.

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adjusted his catheter anyway. In other words, he argues that Scheef intentionally treated him incorrectly, a non-frivolous legal position. Because Williams's claim is not devoid of all arguable merit, the court abused its discretion in dismissing his claim as frivolous. *See, e.g., Eason v. Thaler*, 14 F.3d 8, 10 (5th Cir. 1994) (holding district court abused its discretion in dismissing a claim as frivolous when prisoner's allegations, "[w]ith further factual development and specificity," could support an arguable legal claim).

## B

Just because Williams's claim is not frivolous does not necessarily mean it should proceed. Section 1915(e)(2)(ii) demands that we "shall" dismiss an IFP case that fails to state a claim, and we may affirm the magistrate judge on any ground supported by the record, *see Ruiz*, 160 F.3d at 275, so we also consider whether Williams's allegations are *sufficient* to state a claim.

A prison official is not deliberately indifferent to an inmate's substantial risk of experiencing serious harm unless that official, subjectively, (1) "knows that the inmate[] face[s] a substantial risk of serious harm"; and (2) "disregards that risk by failing to take reasonable measures to abate it." *Gobert v. Caldwell*, 463 F.3d 339, 345-46 (5th Cir. 2006). Even if we accept as true the facts alleged in Williams's Amended Complaint and responses to the magistrate judge's questionnaires, and even if we indulge every reasonable inference in Williams's favor, he has alleged, at most, that Scheef was aware of *some* risk of harm. As Williams describes the facts, the doctor instructed that "mess[ing]" with the catheter "will cause more harm than good." Deliberate indifference requires more. The prison official must know of an "excessive risk" posed by her actions or inactions. *Brewster v. Dretke*, 587 F.3d 764, 770 (5th Cir. 2009). Even if Scheef knew that adjusting the catheter would do more harm than good, Williams has not alleged that Scheef

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knew he was at risk of *serious* or *substantial* or *excessive* harm. He has thus failed to state a claim for deliberate indifference.

### III

While Williams's allegations are not frivolous, they fail to state a claim upon which relief can be granted, and the magistrate judge was correct to dismiss under § 1915(e)(2)(B). The district court's dismissal counts as a strike under § 1915(g). Williams is therefore cautioned that if he accumulates three strikes, he will not be able to proceed *in forma pauperis* in any civil action or appeal filed while he is incarcerated or detained in any facility, unless he is under imminent danger of serious physical injury.

The dismissal is AFFIRMED, and a sanction warning is ISSUED.